

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

04 APR -8 PM 2:40

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

ERIC ROBERT RUDOLPH,  
Defendant.

CR-00-N-0422-S  
UNDER SEAL

**MOTION FOR DISCOVERY OF LAB BENCH NOTES AND OTHER ITEMS CRUCIAL  
TO A FAIR ASSESSMENT OF THE GOVERNMENT'S SCIENTIFIC EVIDENCE**

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## INTRODUCTION

COMES NOW the Defendant by and through undersigned counsel, and moves this Honorable Court to enter an Order compelling the government to disclose laboratory bench notes (work papers), whether handwritten, typed, or electronically recorded, of all experts or technicians who performed any work, analysis, comparison, or testing on any of the evidence in this case, and further ordering that the following material items of discovery be released to the defense in order to allow a fair and critical assessment of the government's scientific evidence:<sup>1</sup>

1) Any photos, including those used to confirm or document results, of items and test runs which are used to confirm results - in this case, that may include print-outs of the chemical analysis charts/runs;

2) Bench notes - so called because they sit with the examiner at the lab bench and are a running log of everything that the person does and everything observed (including time marks for when a test begins and ends, temperature logs for testing, notes of what process used, how the blanks and control results turned out, etc) - these are handwritten, and should show the order in which things are tested. Also, this request includes the bench notes for all testing, not just the test runs where the agent wrote a report. This request includes but is not limited to:

a) Procedure of chemical preparation of evidence items to be analyzed, such as extraction procedure, solvents used;

b) Gas chromatograms, liquid chromatograms and mass spectra should also include background runs (carried out before analysis of evidence items for calibration/quality control and assurance);

3) Chain of custody logs;

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<sup>1</sup> The defense files the present motion under seal for the same reasons cited in the government's expert witness summaries.

- 4) Lab protocols;
- 5) Equipment calibration data, equipment specifications and manuals for all equipment used, including but not limited to parameters and conditions of analytical instruments used:
  - In gas chromatography (GC) and gas chromatography-thermal energy analysis (GC-TEA): type of column, temperature program, carrier gas, type of detector.
  - In liquid chromatography (HPLC) and liquid chromatography-thermal energy analysis (HPLC-TEA): type of column, mobile phase, flow rate, type of detector.
  - In gas chromatography/mass spectrometry (GC/MS): type of ionization (electron ionization (EI) or chemical ionization (CI)).
  - In liquid chromatography/mass spectrometry (LC/MS): type of ionization (electrospray ionization (ESI) or atmospheric pressure chemical ionization (APCI), ion source temperatures and voltages);
- 6) Training and experience of technicians who participated in the testing;
- 7) ASCLD accreditation information: the proficiency data, testing results and assessment;
- 8) Any correspondence or phone records of calls between examiners, between examiners and lawyers, between examiners and crime scene people;
- 9) Any in-house testing or studies that relate to testing done in the labs;
- 10) Details and results of monitoring the laboratory for explosives traces and results. Similarly, results from monitoring any personnel or sites that may have any connection with relevant exhibits;
- 11) Laboratory layout, with reference to what is done where and by whom;
- 12) Specifically identify who did what;
- 13) Details of storing and routing of exhibits through the laboratory;
- 14) Details of any other explosives cases conducted by the laboratory around the time of

and before the Rudolph case.

## **STATEMENT OF FACTS**

On January 9, 2004 the defense wrote the government a letter requesting information regarding all testing done by both the FBI and ATF labs, and any other scientific testing done in connection with this case. (Letter of H. Hube Dodd, II to William Chambers, January 9, 2004, attached hereto as Exhibit A). Specifically, the letter requested:

“1) Any photos, including those used to confirm or document results, of items and test runs which are used to confirm results - in this case, that may include print-outs of the chemical analysis charts/runs;

2) Bench notes - so called because they sit with the examiner at the lab bench and are a running log of everything that the person does and everything observed (including time marks for when a test begins and ends, temperature logs for testing, notes of what process used, how the blanks and control results turned out, etc) - these are handwritten, should show the order in which things are tested. Also, we need to the bench notes for all testing, not just the test runs where they wrote a report. Including but not limited to:

a) Procedure of chemical preparation of evidence items to be analyzed, such as extraction procedure, solvents used.

b) Gas chromatograms, liquid chromatograms and mass spectra should also include background runs (carried out before analysis of evidence items for calibration/quality control and assurance);

3) Chain of custody logs;

4) Lab protocols;

5) Equipment calibration data, equipment specifications and manuals for all equipment used. Including but not limited to:

(a) Parameters and conditions of analytical instruments used:

-In gas chromatography (GC): type of column, temperature program, carrier gas, type of detector.

-In liquid chromatography (HPLC): type of column, mobile phase, flow rate, type of detector.

-In gas chromatography/mass spectrometry (GC/MS): type of ionization (electron ionization (EI) or chemical ionization (CI)).

-In liquid chromatography/mass spectrometry (LC/MS): type of ionization (electrospray ionization (ESI) or atmospheric pressure chemical ionization (APCI), ion source temperatures and voltages);

- 6) Training and experience of technicians who participated in the testing;
  - 7) ASCLD accreditation information: the proficiency data, testing results and assessment;
  - 8) Any correspondence or phone records of calls between examiners, between examiners and lawyers, between examiners and crime scene people;
  - 9) Any in-house testing or studies that relate to testing done in the labs;
  - 10) Details and results of monitoring the laboratory for explosives traces and results.
- Similarly, results from monitoring any personnel or sites that may have any connection with relevant exhibits;

- 11) Laboratory layout, with reference to what is done where and by whom;
- 12) Specifically identify who did what;
- 13) Details of storing and routing of exhibits through the laboratory;
- 14) Details of any other explosives cases conducted by the laboratory around the time of and before the Rudolph case.”

On January 15 2004, the government denied this request in its entirety. (Letter of William

R. Chambers to H. Hube Dodd, II, attached hereto as Exhibit B).

At a status conference on February 25, 2004, the government acknowledged receipt of this request and indicated that the letter “precipitated a call... to the Atlanta ATF lab to get everything they had so that we could get that to you.” (Transcript of Status Conference of February 25, 2004 at p. 12). The government indicated that the discovery produced to the defense on February 20, 2004 “was stuff that had been at the ATF lab, and it was just delivered to us...around Christmas”, and that this discovery “included...printouts from the machines, the mass spectrometer results, the EGIS results, the actual result of the analysis which are the underpinnings of the reports.” (Id. at 11, 14). The government also made clear that it had “not planned on turning over bench notes” and that “it’s our position that bench notes are not discoverable.” (Id. at 14, 19).

Two days prior to the February 25, 2004 status conference, the government filed under seal the following: (1) Summary of Testimony of Expert Witness Edward Bender (EGDN expert); (2) Summary of Testimony of Expert Witness Robert Brissie, M.D. (Sanderson autopsy); (3) Summary of Testimony of Expert Witness Peter Dreifuss (EGDN expert); (4) Summary of Testimony of Expert Witness Lloyd T. Erwin (crime scene, bomb device, EGDN expert); (5) Summary of Testimony of Expert Witness Larry Hankerson (fingerprints); (6) Summary of Testimony of Expert Witness Carl McClary (handwriting); (7) Summary of Testimony of Expert Witness Carolyn Reck (crime scene, bomb device expert); (8) Summary of Testimony of Expert Witness Loring Rue, M.D. (Lyons injuries). The government represented at the status conference that no other experts were presently contemplated in the government’s case in chief. (Id. at p. 7-8). Each of the witness summaries briefly describes the witness’ proposed testimony and has attached to it a copy of the expert’s CV and brief formal lab reports. Each summary includes a statement that the expert “may testify about anything included in any of his official reports *and*

work papers...” No work papers are attached to the summaries or provided in discovery.

## THE PROBLEM

The major problem presented by the government’s refusal to provide lab bench notes and other essential items relating to its expert witnesses is succinctly stated in David L. Faigman, David H. Kaye , Michael J. Saks, Joseph Sanders, Modern Scientific Evidence: The Law And Science Of Expert Testimony (2d. 2003) § 3-4.2 :

...(W)hether for reasons of overwork or to stymie the defense, government experts tend to produce reports that present minimal information about their conclusions and the bases for those conclusions. Thus, the law's goal of forcing the exchange of critical information to facilitate trial preparation is frustrated by experts producing reports that will afford little help in that trial preparation. In an investigation of questionable practices at the FBI Crime Laboratory, the Inspector General of the U.S. Department of Justice found that some forensic scientists would "spruce up" lab notes (enlarge, embellish and change them) as the case approached trial.<sup>2</sup> Some of the embellishment was calculated to make the expert's conclusions be more consistent with other evidence in the trial. In addition to frustrating the goals of the law, this is poor scientific practice.<sup>3</sup>

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<sup>2</sup> U.S. Dep't of Justice, Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (U.S. Doc. J. 1.14/2:L 11/2) (April 1997), available at <http://www.usdoj.gov/oig/fbilab1/fbil1toc.htm>

<sup>3</sup> See also, National Research Council, Forensic Analysis: Weighing Bullet Lead (Nat. Academies Press 2004), p. 105 n. 136 (“For a report from a crime laboratory to be deemed competent,...most scientists would require it to contain a minimum of three elements: (a) a description of the analytical techniques used in the test requested by the government or other party, (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, and (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions.”), quoting Anne Harrison, *Symposium on Science and the Rules of Legal Procedure*, 101 F.R.D. 599, 632 (1984); see also, Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality*, 50 S. CAL. L. REV. 461, 475 n.51 (1977)(“Many criminal defense attorneys suspect that the unusual brevity of reports by FBI fingerprint or handwriting experts (e.g., often one or two short sentences) may be partially explained by the fact that defense counsel is entitled to copies of them prior to trial.”)

An example drawn from this case may illustrate the problem of intentionally vague laboratory reports. The government's *Summary of Testimony of Expert Witness Edward Bender* states that he "may testify about anything included in any of his official reports *and work papers* as well as anything related to his...examination, analysis, comparison and crime and search scene observations." The *Summary* goes on to state that "Mr. Bender will testify that in this case EGDN was detected through the use of the EGIS Explosives Detector using methods, including but not limited to, Thin Layer Chromatography, GC Mass Spectrometer, and/or the Gas Chromatograph Thermal Energy Analyzer." It continues: "Mr. Bender will testify as to the design, operation, testing, performance, and reliability of the EGIS Explosives Detector and will explain each process listed above used to detect the presence of explosives." Later in the *Summary*, the use of Thin Layer Chromatography is dropped in favor of yet another method in the confusing statement that "Mr. Bender will testify that at the National Laboratory all of these items were subjected to examination using the EGIS Explosives Detector through Gas Chromatography Thermal Energy Analyzer, GC Mass Spectrometer, and High Pressure Liquid Chromatography Thermal Energy Analyzer." These descriptions clearly imply that Mr. Bender used one device, the EGIS Explosives Detector, which itself utilizes several methods, "including, but not limited to" Gas Chromatography Thermal Energy Analyzer, GC Mass Spectrometer, High Pressure Liquid Chromatography Thermal Energy Analyzer and/or Thin Layer Chromatography.

The laboratory report attached to this summary merely contains columns across the top with the initials "GC-TEA", "GC-MS", and "HPLC-TEA" followed by the words "Negative" and "EGDN" for some of the tested items, and a blank for others. The implication of the chart appears to be that "GC-TEA", "GC-MS", and "HPLC-TEA" are separate methods that were

employed independent of the EGIS Explosives Detector, and that the Thin Layer Chromatography method was not used at all. Similar obfuscation appears in the summaries for bomb experts Peter Dreifuss and Lloyd Erwin.

Basic and crucial questions which emerge from these summaries and reports include, but are not limited to: (1) What methods and protocols were in fact used to detect explosive residue in this case?; (2) Is opinion testimony derived from those methods and protocols “based on sufficient facts or data” and the “product of reliable principles and methods”, and has the witness “applied the principles and methods reliably to the facts of the case” so as to satisfy the rigors of Federal Rules of Evidence, Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)<sup>4</sup>; (3) What precisely was the amount of EGDN detected; and, (4) Does this amount have any significance in light of the fact that the summaries indicate that “EGDN may be transferred both by means of touch or through handling explosives containing EGDN and through airborne or vapor transmission”?; (4) What steps were taken at the crime scene and at the laboratory to avoid cross contamination from these extraneous sources?; (5) What do the blanks mean in the laboratory report?

The ATF itself recognizes the importance of these and other questions raised by the methods used in this case. Reporting to INTERPOL, Elliott B. Byall, Ph.D., Chief of the ATF's Forensic Science Laboratory in San Francisco has written that “The EGIS chemiluminescence detector is used *for baggage screening*, and (recent) reports ... discuss improved methods for

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<sup>4</sup> “The (typical) challenges (to explosive residue analysis) are to the collection and handling of the items tested; the manner in which the lab work was performed; the care and maintenance of the equipment used and the influence of general operating conditions in the lab. These are matters that may determine the admissibility of the opinion evidence and well may influence the jury's consideration of it if it is received.” *United States v. McVeigh*, 955 F.Supp. 1278, 1280 (D. Colo. 1997)

removing vapors and particulate matter prior to directing the air stream to the EGIS detector.”<sup>5</sup> Were such “improved methods” used in this case? Again, Byall notes the need for a “carefully detailed analytical protocol”, and states that “(t)he extent to which even a protocol involving use of sophisticated instrumentation ‘identifies’ an explosive depends on the rigor of the protocol and conduct of all tests required.” Id. at D3-102. Were “carefully detailed analytical protocols” rigorously applied in this case and were all required tests performed?

Along the same lines, it is noted by Byall that both the European and American forensic explosives community have discussed the question of which and how many techniques are required for confirmation of an explosive identification and that “(t)he problem is complex, and there is no single answer.” (Id. at D3-102). “The techniques to be used must all be acceptable to the scientific community and the main errors associated with particular methods must be eliminated. It was accepted that a single analysis is insufficient to make an identification, but the number required depends on how mutually exclusive the techniques are.” (Id.). For chromatographic techniques, “(o)f major importance is cleanliness and deactivation of the injector port liner, as well as short capillary column length and increased carrier gas velocity.” (Id. at D3-103) Are the particular techniques used in this case *for identification* of explosives residue acceptable to the scientific community and were the main errors associated with particular techniques eliminated?<sup>6</sup> Again, how does one answer these important questions unless

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<sup>5</sup> E. Byall, *Explosives Report 1998-2001 Detection and Characterization of Explosives and Explosive Residue: A Review*, 13<sup>th</sup> INTERPOL Forensic Science Symposium, Lyon, France, October 16-19 2001, <http://www.interpol.int/Public/Forensic/IFSS/meeting13/Reviews/Explosives.pdf>, p. D3-101 (hereinafter, “Byall INTERPOL Report”).

<sup>6</sup> Byall states that “(t)he EGIS portable explosives detector, incorporating a vacuum sampler, high speed GC and chemiluminescence (TEA) detector is a fast, sensitive and selective instrument used in both laboratory and field situations, and is comparable to a conventional laboratory GC/TEA system.” (Id. at D3-104). The three references he cites in support of this

one knows what the particular protocols and methods are and whether they were adequately followed? In the recent words of the National Research Council: “Any good analytical method relies on correct sample preparation, fitness of the instrument for the purpose, proper use of the instrumentation, and reliability. Proper documentation *and transparency of the method* are also necessary.” National Research Council, Forensic Analysis: Weighing Bullet Lead at p. 12.

Diligent research outside the discovery process cannot answer these crucial questions, and in fact only give rise to more questions. For example, internet research on the the EGIS Explosives Detector indicates that it is manufactured by the Thermo Electron Corporation. According to that company’s website<sup>7</sup>, there are actually two EGIS systems (EGIS II and EGIS III), both of which are “designed to be used in conjunction with other techniques in order to provide a comprehensive program *to screen* for explosives.” The EGIS II system has an incredibly low detection limit of 300 picograms. The EGIS III system has an even lower detection limits (100 picograms) and the company claims an even smaller detection limit of one picogram.<sup>8</sup> Both systems use High Speed Gas Chromatography and a Chemiluminescence (Thermal Energy Analyzer) detector, not Thin Layer Chromatography or GS Mass Spectrometer as implied in the summaries. The system uses wipes to collect samples and “(t)he sample material is heated into a gaseous form, added to a carrier gas and introduced into the separation column where the mixture is separated into its individual component compounds by precisely

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statement were not published in a peer reviewed journal and all deal with the use of the EGIS system for screening purposes at airports, not with specific identification of an explosives residue. Byall himself only advocates the use of EGIS “for screening of bomb debris in the laboratory...” (Id. at D3-101). See also, Id. at D3-103 (stating that screening tests like the EGIS system “must be recognized as ‘presumptive’ and...more nearly equivalent to detection than identification”).

<sup>7</sup> <http://www.thermo.com/com/cda/product/detail/1,1055,114505,00.html>

<sup>8</sup> 1 picogram is one trillionth of a gram

controlled temperature cycling.” What system was used in this case, the EGIS II or the EGIS III? How did the operator insure that the machine used “precisely controlled temperature cycling”? And finally, how did the operator of the EGIS Explosives Detector in the field and the later handlers of the samples in the laboratory insure against cross contamination in a system so sensitive it is capable of detecting one trillionth of a gram? As ATF official Byall points out,“(a)s improved technology allows explosive detection at lower and lower levels, precautions must be put in place to prevent cross contamination and to monitor all aspects of the evidence collection and examination procedures.” (Byall INTERPOL Report at D3-108).<sup>9</sup>

In this case, the defense’s concern about contamination is not hypothetical. In a separate in camera submission in support of this motion defendant presents the confidential fruits of defense investigation which reveals beyond doubt that the defense’s concerns about contamination are well founded and serious. See, *United States v. Jordan*, 316 F. 3d 1215, 1252 (11<sup>th</sup> Cir. 2003)(in camera submission is the appropriate method to present information protected by the attorney work product privilege).

The problems caused by conclusory laboratory reports and inadequate discovery of bench notes and other crucial items are not confined to the explosives detection experts in this case. As the Court itself stated at the February 25, 2004 status conference, “if the defense wants to get its own fingerprint expert to say this fingerprint does not match X, Y and Z as the government says it does, the only way they’re able to do that is by getting that lifted latent print or a copy of it or

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<sup>9</sup> In support of this statement, Byall cites a recent study which demonstrated that despite adherence to a rigorous decontamination protocol, an explosives detection laboratory still experienced significant instances of contamination, including multiple instances of up to 43,000 nanograms (43 million picograms) of contaminating explosives particles on the examination/kit preparation benches caused by contaminated photographic equipment, contaminated watches and wrist jewelry worn by examiners, contaminated centrifuges, and contaminated air filters. See, Crowson A, Hiley RW and Todd C. *Quality assurance testing of an explosive trace analysis laboratory*. Journal of Forensic Sciences 2001; 46: 53-56.

some version of it. “ (Status Conference Transcript at p. 17). Moreover, a copy of the latent itself would still not reveal the methodology of the expert in developing the latent or the basis of the fingerprint expert’s conclusory statements that a latent somehow “matched” the known prints of Mr. Rudolph. What protocol was used to match the prints? How many points of comparison “matched” and where exactly are they on the latent and known prints? See, *United States v. Robinson*, 44 F. Supp. 2d 1345 (N.D. Ga. 1997)(testimony of the government's fingerprint expert would be suppressed as a discovery sanction for government's failure to turn over written summary of witness' testimony including basis and reasons for his opinions and “ all of the points of identification on which the government's expert would rely...”)). These same questions arise in relation to the “tape, hose clamps, foil, metal, cord, silicone sealant, wire connectors, cement, and nails” comparisons performed by Lloyd Erwin, the handwriting comparisons of Carl McClary, and the bomb and crime scene reconstructionists. The other expert summaries and reports, involving crime scene and bomb reconstruction and pathology are also deficient because they do not include (a) a description of the analytical techniques used in the test requested by the government or other party, (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, or (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions. (See n. 1, *supra*).

## MEMORANDUM OF LAW

### I.

#### GENERAL PRINCIPLES PERTAINING TO DISCOVERY IN A CAPITAL CASE

Like other aspects of a capital trial, discovery in a federal death penalty case must be governed by the overriding Eighth Amendment principle that "heightened reliability is essential to the process of imposing a death sentence." *United States v. Fell*, 360 F. 3d 135, 143 (2d. Cir 2004). As the Supreme Court has repeatedly emphasized, "the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death. The finality of the death penalty requires a 'greater degree of reliability' when it is imposed." *Murray v. Giarratano*, 492 U.S. 1, 8-9, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (internal citations omitted); see also *Monge v. California*, 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (observing that there is an "acute need for reliability in capital sentencing proceedings"); *Simmons v. South Carolina*, 512 U.S. 154, 161-62, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); *Lowenfield v. Phelps*, 484 U.S. 231, 238-39, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Beck v. Alabama*, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); *Gardner v. Florida*, 430 U.S. 349, 357, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); and *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion) ("Because of th[e] qualitative difference [between a death sentence and life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

"The need for pretrial disclosure of the nature and content of expert testimony is critical if the adversary system of trial is going to work." National Research Council, Forensic Analysis: Weighing Bullet Lead (Nat. Academies Press 2004), p. 103. The American Bar Association Standards Relating to Discovery and Procedure Before Trial 66 (Approved Draft 1970) note that

“the need for full and fair disclosure is especially apparent with respect to scientific proof and the testimony of experts. This sort of evidence is practically impossible for the adversary to test or rebut at trial without an advance opportunity to examine it closely.” See also, National Research Council, *DNA Technology in Forensic Science* 146 (1992)(“The prosecutor has a strong responsibility to reveal fully to defense counsel and experts retained by the defense all materials that might be necessary in evaluating the evidence”); Id. at 105 (“Case records—such as notes, worksheets, autoradiographs, and population databanks—and other data or records that support examiners’ conclusions [should be] prepared, retained by the laboratory, and made available for inspection on court order after review of the reasonableness of a request.”). See also, Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 *Vanderbilt L. Rev.* 791, 798 (1991)(“There is little dispute that pretrial discovery is necessary when using expert and scientific evidence. In this context at least, the traditional arguments against criminal discovery lose whatever force they otherwise might have.”)

In ordering broad disclosure under Rule 16(a)(1)(E) of chain of custody, laboratory bench sheets, testing procedures utilized, calibration standards utilized, contamination control procedures, laboratory preparation logs, identifying information for instruments and equipment utilized, and “other methodologies actually employed for the testing”, one court in a non-capital case stated succinctly and persuasively the overriding policy considerations favoring such an approach:

Where scientific methodology or data is involved in proving a defendant's guilt, it is unreasonable to expect defense counsel to be able to delve into technical aspects of that methodology/data on the spot at trial. As a practical matter, this type of information is often very difficult to prepare for in advance, despite the use of experts, as the precise methodology utilized by government experts will not often be known without advance discovery of the underlying methodology/data. Further, the government will be required to establish a foundation for the test results when it first puts its expert on the stand at trial. That foundation is the information which defendants now seek. Since the

foundation is an essential element to the government's case-in-chief, it necessarily becomes "helpful to the defense." Moreover, for issues in which scientific data will be utilized, there are no safety considerations which would be compromised by this rule. By having access to the requested information, the defense will not unfairly jeopardize the government's case--it will merely be able to properly challenge that case.

*United States v. Liquid Sugars, Inc.*, 158 F.R.D. 466, 471-472 (E.D. Ca. 1994)

Under Rule 16(a)(1)(E), the government "must" permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, if the requested items (1) are material to the preparation of the defendant's defense; (2) are intended for use by the government as evidence in chief at the trial; or (3) were obtained from or belong to the defendant. See also, Rule 16(a)(1)(F) and Rule 16(a)(1)(G), discussed *infra*.

Importantly, "documents are considered part of the evidence in chief if they are marked and offered into evidence by the government *or relied on or referred to in any way by the government's witness.*" *United States v. Jordan*, 316 F. 3d 1215, 1250 n. 75 (11<sup>th</sup> Cir. 2003). Just as importantly, Rule 16 "is intended to prescribe the minimum amount of discovery to which the parties are entitled", and leaves intact a court's 'discretion' to grant or deny the 'broader' discovery requests of a criminal defendant." 316 F. 3d at 1249 n. 69, quoting Notes of Advisory Committee on 1974 Amendments to Federal Rules of Criminal Procedure, Fed.R.Crim.P. Rule 16. See also *United States v. Beckford*, 962 F.Supp. 748, 755 (E.D.Va.1997) ("numerous courts ... have recognized that the discovery provisions in ...(Rule 16) are not exclusive and do not supplant a district court's inherent authority to order discovery outside the rules") (citations omitted).

In addition to the government's discovery obligations under Rule 16(a), "the government must also honor the defendant's constitutional rights, particularly the due process right *Brady v.*

*Maryland* (373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)) established. *Brady* requires the prosecutor to turn over to the defense evidence that is favorable to the accused, even though it is not subject to discovery under Rule 16(a), since, eventually, such evidence may ‘undermine[ ] the confidence in the outcome of the trial.’” 316 F. 3d at 1251.. See also, *Banks v. Dretke*, \_\_U.S. \_\_\_, 124 S. Ct. 1256 (2004)(capital murder conviction reversed for *Brady* violation). The prosecutor also has an “‘ongoing’ duty to disclose ... any impeachment evidence that is likely to cast doubt on the reliability of a witness whose testimony ‘may well be determinative of guilt or innocence’.” 316 F. 3d at 1251, quoting *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Further, “it matters not whether exculpatory or impeaching material is in the form of raw notes, a 302, or an interoffice communication: if the document contains exculpatory or impeaching information, the prosecution is duty bound to disclose it.” 316 F. 3d at 1257 n. 89.

Independently of these obligations, the Jencks Act “mandates that a statement by a prospective prosecution witness to an investigative agent or the grand jury must be provided to the defense after the witness has testified on direct examination.” 316 F. 3d at 1251. “(A)n interviewer's raw notes, and anything prepared from those notes (such as an FBI 302), are not Jencks Act statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness. See *United States v. Delgado*, 56 F.3d 1357, 1364 (11th Cir.1995). On the other hand, if the agent is called as a witness, these statements--depending on the scope of the agent's testimony on direct examination--may constitute Jencks material. See *United States v. Saget*, 991 F.2d 702, 710 (11th Cir.1993).” 316 F. 3d at 1252.

**II**  
**MR. RUDOLPH IS STATUTORILY AND CONSTITUTIONALLY ENTITLED TO  
DISCOVERY OF LAB BENCH NOTES AND THE OTHER ITEMS REQUESTED IN  
THIS MOTION BECAUSE THEY ARE CRUCIAL TO A FAIR ASSESSMENT OF THE  
GOVERNMENT'S SCIENTIFIC EVIDENCE**

Applicable case law indicates that there are both statutory and constitutional grounds supporting the present motion, including the following:

**1. Rule 16(a)(1)(E)**

As indicated above, under Rule 16(a)(1)(E) the government must permit the defendant to inspect and copy documents, photographs , and tangible objects which are within the possession, custody or control of the government, if the requested items “are intended for use by the government as evidence in chief at the trial.” This Court need go no further than this language to rule that the government must produce bench notes and the other thirteen items listed above, since the government avers as to all of its experts that each expert will, in the words of the summary pertaining to Agent Bender, “testify about anything included in any of his official reports *and work papers* as well as anything related to his...examination, analysis, comparison and crime and search scene observations.” The same summary also states that “ Mr. Bender will testify as to the design, operation, testing, performance, and reliability of the EGIS Explosives Detector and will explain each process listed above used to detect the presence of explosives.”

The Eleventh Circuit has held that “documents are considered part of the evidence in chief if they are marked and offered into evidence by the government *or relied on or referred to in any way by the government's witness.*” *United States v. Jordan*, 316 F. 3d 1215, 1250 n. 75 (11<sup>th</sup> Cir. 2003). This ruling is binding and mandates discovery of at least the items the government says its experts are relying on or referring to in any way. See also, *United States v. Dioguardi*, 428 F.2d 1033, 1038 (2d Cir.1970)(“We fully agree that the defendants were entitled to know what operations the computer had been instructed to perform and to have the precise

instructions that had been given. It is quite incomprehensible that the prosecution should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross-examination if desired. We place the Government on the clearest possible notice of its obligation to do this and also of the great desirability of making the program and other materials needed for cross-examination of computer witnesses, such as flow-charts used in the preparation of programs, available to the defense a reasonable time before trial.”); *United States v. Yee*, 129 F.R.D. 629, 635 (N.D. Ohio 1990)(“I conclude... that predicate materials relied on by experts who testify in support of admission of [DNA] scientific evidence are encompassed within the provisions of Rule 16(a)(1)(C), which authorizes pretrial disclosure of documents intended for use by the government as evidence in chief at trial.”)(ordering production of matching criteria, environmental insult studies, population data, and proficiency tests).

Even if the government had not submitted such summaries, under Rule 16(a)(1)(E) the government must permit the defendant to inspect and copy documents, photographs , and tangible objects which are within the possession, custody or control of the government, if the requested items “are material to the preparation of the defendant's defense.” In *United States v. Liquid Sugars, Inc.*, 158 F.R.D. 466, 471-472 (E.D. Ca. 1994), the defendant in a Clean Water Act prosecution sought to compel production of documents concerning sampling, testing and underlying analysis of wastewater. The court ordered production of a broad range of items, including chain of custody, laboratory bench sheets, testing procedures utilized, calibration standards utilized, laboratory preparation logs, identifying information for instruments and equipment utilized, and “other methodologies actually employed for the testing”, which is identical to much of the same information being requested in the present motion. In interpreting what is now Rule 16(a)(1)(E) , the court stated:

This court defines "material information" for Rule 16(a)(1)(C) purposes as that information, not otherwise provided for or precluded by discovery rules, which is significantly helpful to an understanding of important inculpatory or exculpatory evidence. " 'The materiality requirement typically 'is not a heavy burden,' rather, evidence is material as long as there is a strong indication that ... [the evidence] will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.' " *United States v. Jackson*, 850 F.Supp. 1481, 1503 (D.Kan.1994) quoting *United States v. Lloyd*, 992 F.2d 348, 351 (D.C.Cir.1993) (emphasis added). For example, if the government plans to use the results of scientific tests as evidence, data and reports which directly underlie those results are generally important to an understanding of the evidence.<sup>10</sup>

In *United States v. Siegfried*, 2000 WL 988164 (N.D. Ill. 2000), Drug Enforcement Administration chemists performed laboratory analysis of a number of substances seized from Siegfried's residence. The government produced the chemists' reports and laboratory notes to the defense. Siegfried then sought discovery of the laboratory protocols—"in other words, testing methodologies--so that he can have an expert examine them to determine their reliability." The government resisted disclosure of these items, saying that they were outside the scope of then

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<sup>10</sup> The Eleventh Circuit agreed to a similar definition in *Jordan* when it stated that in order to satisfy the materiality requirement of Rule 16(a)(1)(E), "the defendant must make a specific request for the item together with an explanation of how it will be 'helpful to the defense'". The Court cited *United States v. Marshall*, 132 F.3d 63, 67-68 (D.C.Cir.1998) for the proposition that "'helpful' means relevant to preparation of the defense *and not necessarily exculpatory*", although the Court also cited *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir.1978) for the somewhat inconsistent proposition that "the defendant must 'show' 'more than that the [item] bears some abstract logical relationship to the issues in the case.... There must be some indication that the pretrial disclosure of the [item] would ... enable [ ] the defendant significantly to alter the quantum of proof in his favor.". 316 F. Ed at 1250.(Emphasis added). But see, *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)(the Supreme Court defined materiality as a showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.") . The court in *Liquid Sugar* specifically held that " (t)he court's definition of materiality for purposes of reviewing discovery requests pre-trial does not conflict with established precedent that imposes a more strict materiality standard when seeking to reverse a conviction on appeal." 158 F.R.D. at 472. The Court persuasively reasoned that "(t)he Court of Appeal has the benefit of hindsight, i.e., it can assess the significance of the requested, but not disclosed, evidence against the backdrop of precisely what facts were introduced at trial which demonstrate the defendant's guilt. Prior to trial, this court has no such benefit. Requiring a district court to predict what will change the verdict months before it is ever decided is a markedly impossible directive." (Id.)

Federal Rule of Criminal Procedure 16(a)(1)(D), which requires production of "results or reports ... of scientific tests or experiments." It relied on *United States v. Iglesias*, 881 F.2d 1519, 1523-24 (9th Cir.1989), in which the court held that the trial court's failure to order production of testing protocols was not an abuse of discretion, *United States v. Price*, 75 F.3d 1440, 1445 (10th Cir.1996), in which the court held that discovery of laboratory notes was not required under the Rule, and *Wolford v. United States*, 401 F.2d 331, 333 (10th Cir.1968), in which the court held that the defendant had not been prejudiced by the government's failure to produce documents describing laboratory testing procedures.

The district court responded to these case as follows:

The fact that denial of discovery might ultimately turn out on appeal not to have prejudiced the defendant or to have constituted an abuse of discretion is not a compelling reason for a trial court not to order the discovery in the first place. Unlike the Court of Appeals, this Court has not seen or heard the evidence at trial and cannot say whether the information requested will turn out to be insignificant or that its non-production ultimately will not demonstrably prejudice the defense. Based on the limited material now available to the Court, it appears that the government's case will be based in significant part on the results of the tests. That being the case, considerations of fundamental fairness require that the defense have access to material concerning the manner and means of testing so that it can make an independent determination of the tests' reliability and have a fair opportunity to challenge the government's evidence. The testing protocols may not be, strictly speaking, "results or reports" of testing and thus may well not be covered by Rule 16(a)(1)(D). Even if not, however, the Court believes for the reasons stated that the protocols are "material to the preparation of the defense" and are thus within the scope of Rule 16(a)(1)(C) even if they are outside the scope of Rule 16(a)(1)(D). The Court therefore directs the government to produce to the defendant, within 28 days of this order, protocols for all scientific tests used in connection with the investigation of this case.

More recently, in *United States v. Cedano-Arellano*, 332 F.3d 568 (9th Cir.2003), cert. denied, *Cedano-Arellano v. U.S.*, 124 S.Ct. 1119, 157 L.Ed.2d 945(2004), the Ninth Circuit held that it was reversible error under Rule 16(a)(1)(E) and 16(a)(1)(F) to deny to a drug defendant "a broad range of materials" relating to a narcotics detector dog that "alerted" on his gas tank, "including his handler's log, all training records and score sheets, certification records, and

training standards and manuals.” Id. at 570. The district court declined to compel general discovery on the dog, ruling that the government's obligations were as follows: (1) to establish the dog's reliability, if it intended to rely on the dog to establish reasonable suspicion for the subsequent search of the gas tank; (2) if the government did intend to put on evidence about the dog, to disclose all *Brady* material suggesting that the dog was not reliable; and (3) under Rule 26.2, to disclose to the defense any prior statements that the officer testifying about the dog's reliability had made. Otherwise, the district court concluded, if the requested material was not *Brady* material, the government had no obligation to disclose it. (Id.) The Ninth Circuit ruled:

Cedano-Arellano argues that the materials at issue were crucial to his ability to assess the dog's reliability, a very important issue in his defense, and to conduct an effective cross-examination of the dog's handler. We agree. For example, the handler testified that the dog had been certified several times and had achieved a much-better-than- passing score on the certification tests. We can see no reason why the certification documents, the production of which had been requested and about which the handler testified, should not have been disclosed.

In light of all these cases, it cannot be doubted that Mr. Rudolph has a right under Rule 16 (a)(1)(E) to production of the documents requested herein. The government's expert summaries clearly indicate that the experts will testify about anything included in any of their official reports *and work papers* as well as anything related to their examination, analysis, comparison and crime and search scene observations. The same summaries also state that the experts will testify as to the design, operation, testing, performance, and reliability of the testing instruments used in this case. The present motion merely seeks the predicate materials upon which the experts testimony is based. Because the experts relied on this very material to form their opinions, and because disclosure of such material would be helpful and material to the defense efforts to discredit and cast doubt on the reliability and validity of the tests, the defendant is entitled to production of the requested material.

## 2. Rule 16(a)(1)(F)

Fed. R. Crim. P. 16(a)(1)(F) provides that results or reports of medical examinations or scientific tests in the possession and control of the government that are material to the defense or which the government is going to use at trial are to be provided to a defendant upon request.

In *United States v. Green*, 144 F.R.D. 631, 639 (W.D. N.Y. 1994), the defense sought the results of all physical examinations or scientific tests, as well as the underlying data, including lab notes prepared in connection with such examinations or tests. The government conceded that it had an obligation to turn over the results or reports of scientific tests as specified in Rule 16(a)(1)(D), but otherwise opposes this request. The Court ruled as follows:

After review of the legal authority cited by defendants, the government is directed to turn over to the defendants not only all scientific reports but also all findings, scientific or technical data upon which such reports are based. *United States v. Bel-Mar Laboratories*, 284 F.Supp. 875, 887 (E.D.N.Y.1968). Rule 16(a)(1)(C) provides for discovery of documents in the possession of the government "which are material to the preparation of the defendants' defense." Rule 16(a)(1)(D) provides discovery of "any results or reports of physical or mental examinations, and of scientific tests or experiments ... which are within the possession, custody, or control of the government...." These two provisions, when read together, provide ample authority for disclosure of this information. Furthermore, the government has not demonstrated in its opposing papers or at oral argument that it will be prejudiced by disclosure of this information. To the contrary, it would appear to facilitate trial by enabling defense counsel to assess the correctness or sufficiency of the testing and to prepare to cross examine the government's experts and to present defense experts, if appropriate. See *United States v. Kelly*, 420 F.2d 26, 28 (2d Cir.1969).

Other courts have adopted this same reasoning. See, *United States v. Marcus*, 193 F. Supp. 2d 552, 560 (E.D.N.Y.,2001) (Rule 16(a)(1)(C) and Rule 16(a)(1)(D) require that the government " turn over to the defendant [ ] not only all scientific reports but also all findings, scientific or technical data upon which such reports are based."); *State v. Fortin*, 2004 WL 190051 (N.J., Feb. 3, 2004)("(W)e conclude that the trial court committed reversible error in permitting [ a former FBI profiler] to testify absent the production of a reliable database.")(The production of a reliable database as an essential qualifier to the expert's testimony " ensure(s)

that his ... comparison techniques would be subject to verification, allowing the defense a fair opportunity to test his methods and credibility in the crucible of cross-examination.”); *State v. Dunn*, 571 S.E. 2d 650 (N.Car. App. 2001) (“Like federal Rule 16(a)(1)(D), Section 15A-903(e) must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also any tests performed or procedures utilized by chemists to reach such conclusions.”); *State v. Paul*, 437 S.W.2d 98, 101 (Mo.App.1969)(chemical test of defendant’s breath inadmissible absent discovery of the type of equipment used, whether and when it had been inspected for accuracy and the result thereof, the names and qualifications of persons making the chemical analysis, the time defendant had been observed by the testing personnel, and a description of the procedure used in testing for alcoholic content of the defendant’s blood.); *Wynn v. State*, 423 So.2d 294 (Ala.Crim.App.1982)(The court held that the term “results” as used in a stipulation for admission of results of a polygraph examination covered not only the examiner’s final conclusion but background information necessary for evaluation of his opinion.)

The one case ruling to the contrary from the Fifth Circuit, *United States v. Berry*, 670 F.2d 583 (5th Cir.1982), is not controlling here because the court did not consider the effect of what is now Rule 16 (a)(1)(E), 16(a)(1)(G), Rule 702 or *Daubert* ,and the court’s ruling in that case was based on an appellate finding that the defendant in a simple drug possession case had suffered no prejudice from the denial of work notes or a lab manual pertaining to routine drug testing.<sup>11</sup> The sophisticated and complex scientific procedures employed in this capital case bear

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<sup>11</sup> The court’s entire discussion of the issue is as follows: “ Berry’s next arguments, that he was prejudiced by the government’s failure to disclose items such as an infrared spectogram, a chemist’s personal work notes, and a “Drug Enforcement Administration Analytical Manual,” also must fail. The magistrate’s finding that his order had been satisfied, the spectogram’s general availability as a reference standard, the absence of any need for the work notes since Rule 16’s requirement that results or reports of any examinations be disclosed provided Berry with whatever relevant information the notes might contain, and the district court’s ruling that the manual was irrelevant, all indicate that the district court did not abuse its discretion in holding

no resemblance to the testing in *Berry* and in any event, for the reasons stated in both *Liquid Sugar* (see supra n. 10) and *United States v. Siegfried*, supra, “(t)he fact that denial of discovery might ultimately turn out on appeal not to have prejudiced the defendant or to have constituted an abuse of discretion is not a compelling reason for a trial court not to order the discovery in the first place.” 2000 WL at 988164. Rule 16(a)(1)(F) thus provides a second basis upon which this motion for discovery should be granted.

### **3. Rule 16(a)(1)(G)**

Rule 16 was amended in 1993 to provide that upon a defendant’s request, the government shall disclose a written summary of expert testimony which “shall describe the witnesses’ opinions, the bases and the reasons for those opinions, and the witnesses’ qualifications.” According to the Advisory Committee Notes, requiring a summary of the bases relied upon by the expert “should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703.” This provision was intended to “expand federal criminal discovery” in order to “minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert’s testimony through cross examination.” (Id.)

As indicated above, in *United States v. Robinson*, 44 F. Supp. 2d 1345 (N.D. Ga. 1997)

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that the government had adequately complied with both Fed.R.Crim.P. 16 and the magistrate’s disclosure order.” 670 F.2d at 605-606. The case has never been cited in the Eleventh Circuit on this point and it obviously did not and could not consider the effect of *Daubert* or the 2000 Amendments to Federal Rules of Evidence Rule 702 which now requires that the court assess whether the expert witness “applied the principles and methods reliably to the facts of the case”. Under *Daubert* and Rule 702, “any step that renders the analysis unreliable ... renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.” *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir.1994)).

the district court held that testimony of the government's fingerprint expert would be suppressed as a discovery sanction for the government's failure to turn over a written summary of the witness' testimony, including the basis and reasons for his opinions and "all of the points of identification on which the government's expert would rely..." The Magistrate Judge in that case had ordered the government to strictly comply with Rule 16 with reference to expert testimony after defense counsel gave notice of the importance of the fingerprint examination in his case. One day before trial, the government filed a witness summary which "proved to be a conclusory report indicating that it was the fingerprint expert's opinion that the print on the warrant of deportation was identical with the known fingerprints of Patrick Robinson." Id. at 1346.

In especially strong language, the Court explained why providing a photograph of the latent print did not satisfy the government's discovery obligation under then Rule 16(a)(1)(E):

A fingerprint expert bases opinions on the location of a plurality of distinctive patterns within one fingerprint and the location of those same patterns, in an identical relationship to each other, in another fingerprint. It is this court's experience that even where a fingerprint experts provide blowups it is difficult for the court or the jury to determine the existence or nonexistence of a particular feature or to determine if it is in the same relationship. The terminology is somewhat arcane and the means of judging relationships is not immediately familiar.

When a defendant faces an expert witness at trial there are two issues. The first is whether the witness's testimony is entitled to appreciable weight based on the reasons given for the opinions stated. The second issue is whether or not the prints were in fact made by the same person. If a defendant has a clear copy of the print in question, he may obtain his own expert to offer an opinion on the ultimate fact and, therefore, the defendant is not prejudiced in this regard by a failure of the government to provide the bases for its expert's opinion.

A defendant, however, is never required to introduce any evidence and, therefore, the defendant has a right to predicate a trial strategy solely on an attack of the opinion evidence offered by the government. If a defendant does not have the bases for the government's opinion, there is no way the defendant's counsel can effectively cross-examine the expert. It is this issue, which goes to the fairness of the trial, that the court must always keep in mind in dealing with discovery issues in criminal cases. There are also concerns of judicial economy and the legitimate expectation of the public and of the defendant in the speedy disposition of criminal cases. In this case the relevant portions of Rule 16 tell the Assistant United States Attorney what he must do. He was ordered by the United States

Magistrate Judge to comply with his Rule 16 obligations generally and this one in particular. A United States District Judge told him precisely what he must do and granted a continuance. Yet the Assistant United States Attorney failed to comply with the court's order....

As best this court can determine, the failures of the government in this case to comply with its Rule 16 obligations were begun in lethargy and a lackadaisical acknowledgment of the mandates of Rule 16 and ended with inattention to the order of the court, a stubborn refusal to understand the requirements of Rule 16, and a somnolent review of the materials being produced.

To be sure, the court could have granted yet another continuance for the government to get it right. The court might have even invited the expert witness to chambers and assisted that expert in dictating a proper report to the judge's secretary. This matter, however, ought to be at an end. Failing to impose a sanction on this record would be to establish a precedent countenancing a disregard of discovery obligations which will assure either a snail like progression of the 800 felony cases filed in this court annually or a succession of trials in which the United States Department of Justice is allowed to flaunt the law it exists to support and defend.

Id. at 1347-1348.

See also, *United States v. Wilkerson*, 189 F.R.D. 14, 15 (D.Mass.1999)(Rule 16(a)(1)(G) required a detailed summary of the tests at issue, including description of the sample received, what the examiner did to ready the sample for the test(s), a description of the test(s)(i.e., how the test(s) work(s) to detect the drugs), what physically was done with the sample during the test(s), what physically occurred to the sample as a result of the test(s), what occurred which led the examiner to his or her conclusion that the substance was cocaine, any steps taken to review the test(s) results to insure accuracy, any other action with respect to the sample or the testing, and what the examiner did with the sample after examination.)

Rule 16(a)(1)(G) thus provides a third and final statutory basis upon which this motion for discovery should be granted.

#### **4. Brady/Giglio**

*Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1994) and, more recently, *Banks v. Dretke*, \_\_U.S. \_\_, 124 S. Ct. 1256, 1275 (2004), strongly support the argument that the scope of *Brady* material is indeed broad and imposes a substantial burden upon the prosecution to disclose exculpatory or mitigating information. In *Kyles*, the Court stated:

While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S., at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

514 U.S. at 437, 438.

In reversing a capital murder conviction for a *Brady* violation in *Banks v. Dretke*, \_\_U.S. \_\_, 124 S. Ct. 1256, 1275 (2004), the Court was even more blunt:

The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence," Tr. of Oral Arg. 35, so long as the "potential existence" of a prosecutorial misconduct claim might have been detected, *id.*, at 36. A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.

*Kyles* also suggests a definition of "favorable evidence" which is directly applicable to the discovery of bench notes and other scientific data sought in this case. The Court cited *Bowen v. Maynard*, 799 F.2d 593, 613 (C.A.10 1986), for the proposition that "(a) common trial tactic of

defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation". 514 U.S. at 445, 446. On the same page, the Court cites to *Lindsey v. King*, 769 F.2d 1034, 1042 (C.A.5 1985) which the Court describes as a case where a new trial was ordered "because withheld *Brady* evidence 'carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case'". The Court ends its discussion of this point as follows:

The dissent ... suggests that for jurors to count the sloppiness of the investigation against the probative force of the State's evidence would have been irrational, but of course it would have been no such thing. When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it.

Id. at 446 n. 15

All of the discovery sought in the present motion has precisely the potential "for the ... discrediting ... of the police methods employed in assembling the case'" by showing "sloppiness" and/or "sovenly work.". As pointed out in *United States v. McVeigh*, 955 F.Supp. 1278, 1280 (D. Colo. 1997) , "(t)he (typical) challenges (to explosive residue analysis) are to the collection and handling of the items tested; the manner in which the lab work was performed; the care and maintenance of the equipment used and the influence of general operating conditions in the lab. These are matters that may determine the admissibility of the opinion evidence and well may influence the jury's consideration of it if it is received." The same may be said for methodological attacks on any prosecution forensic science evidence, including the fingerprint, handwriting, toolmarks and crime and bomb scene reconstruction techniques used in this case. Because the present motion seeks the very kind of discovery material which scientists themselves insist is crucial in evaluating and attacking forensic evidence, such material must be deemed material and

therefore discoverable under the *Brady/Giglio* line of cases.<sup>12</sup>

### III

#### **Rule 16(a)(2) DOES NOT PRECLUDE THE DISCOVERY REQUESTED HEREIN**

Rule 16(a)(2) exempts from disclosure "reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case," and "statements made by government witnesses or prospective government witnesses." Again quoting from David L. Faigman, David H. Kaye , Michael J. Saks, Joseph Sanders, Modern Scientific Evidence: The Law And Science Of Expert Testimony (2d. 2003) § 3-4.2:

Lawyers often try to insulate their experts and their communications with their experts from discovery, asserting or implying that the expert is covered by the (work product) doctrine. The work-product doctrine has been stated in this language: "In ordering discovery ... the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." <sup>13</sup> Examples of "other representatives" given by the drafters of the rule are private investigators and insurance claim agents. <sup>14</sup> There are at least two reasons to think that the phrase "other representative" does not include expert witnesses, and therefore what expert witnesses think or write is not attorney work product. First of all, it certainly does not include fact witnesses. Second, additional rules were developed specifically to regulate discovery from experts...

In civil cases, testifying expert witnesses are governed by Fed.R.Civ.P. 26(b)(4)(A) which states: "A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required ... the deposition shall

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<sup>12</sup> At the very least, the Court should follow the mandate of *Jordan*, which concluded that "(n)ot infrequently, what constitutes *Brady* material is fairly debatable. In such cases, the prosecutor should mark the material as a court exhibit and submit it to the court for in camera inspection." *United States v. Jordan*, 316 F. 3d 1215, 1252 (11<sup>th</sup> Cir. 2003).

<sup>13</sup> Fed.R.Civ.P. 26(b)(3).

<sup>14</sup> See also *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

not be conducted until after the report is provided." This rule seems to leave little to secrecy. The reasoning behind the rule removes all doubt as to Congress' understanding of the work product doctrine as it applies to testifying experts :

Many ... cases present intricate and difficult issues as to which expert testimony is likely to be determinative....[A] prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent....Effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated....These considerations appear to account for the broadening of discovery against experts in the cases cited.... In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial....

These new provisions ... repudiate the few decisions that have held an expert's information privileged simply because of his [or her] status as an expert....They also reject as ill-considered the decisions which have sought to bring expert opinion within the work-product doctrine. By the lights of the black-letter law, expert witnesses appear to be witnesses, and their knowledge, before trial as well as during, is not shielded in the way that the knowledge of the advocate is.<sup>15</sup>

Additionally, many of the items the defendant seeks were not prepared in anticipation of this case and therefore cannot possibly be classified as "work product". In *United States v. Cedano-Arellano*, 332 F.3d 568, (9th Cir.2003) the court ruled with respect to a narcotic dog's certification and training records that "the dog's training materials and records plainly do not fall within the scope of Rule 16(a)(2): they were not made in connection with investigating or prosecuting this or any other case, and most of them (with the possible exception of the training log) are not statements by prospective government witnesses. Cf. *United States v. Armstrong*, 517 U.S. 456, 462-63, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (characterizing Rule 16(a)(2) as precluding discovery of "government work product in connection with [the defendant's] case")."

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<sup>15</sup> Advisory Committee's Notes to Fed.R.Civ.P. Rule 26.

332 F. 3d at 790.

Finally, as to whether any of the requested material constitutes statements of any witness, “an interviewer's raw notes, and anything prepared from those notes (such as an FBI 302), are not *Jencks* Act statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness. See *United States v. Delgado*, 56 F.3d 1357, 1364 (11th Cir.1995). On the other hand, if the agent is called as a witness, these statements--depending on the scope of the agent's testimony on direct examination--may constitute *Jencks* material. See *United States v. Saget*, 991 F.2d 702, 710 (11th Cir.1993).” *United States v. Jordan*, supra, 316 F. 3d at 1252. (Emphasis added). But see, *United States v. Cedano-Arellano*, 332 F.3d 568, 572 (9th Cir.2003)(“In deciding whether something constitutes a “statement” under the *Jencks* Act, this Court has focused on the distinction between investigative interviews and surveillance observations, rather than on whether the material was communicated to another person. The training logs are more like surveillance observations than witness statements. The logs were not ‘intended to form the basis for evidence at trial.’ Therefore, the district court did not err in ruling that the logs were not statements for purposes of the *Jencks* Act.)

Even if this court determines after an in-camera inspection that bench notes or some of the other requested material constitutes a statement of the expert, pretrial discovery does not have to be denied. First, as ruled in *Jordan*, “it matters not whether exculpatory or impeaching material is in the form of raw notes, a 302, or an interoffice communication: if the document contains exculpatory or impeaching information, the prosecution is duty bound to disclose it.” 316 F. 3d at 1257 n. 89. And second, as ruled in the same case, “(i)n some cases, if the prosecutor trusts defense counsel and, moreover, is satisfied that an earlier production of a *Jencks* statement will not lead to mischief, such as witness intimidation, the prosecutor may turn it over

before the witness is to testify. Indeed, it is customary in many jurisdictions for the government to produce *Jencks* materials prior to trial.” Id. at 1251 n. 78

### CONCLUSION

WHEREFORE, for any or all of the foregoing reasons, Mr. Rudolph requests this Court to enter an order granting this motion for discovery.

Respectfully submitted,

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BILL BOWEN  
JUDY CLARKE  
MICHAEL BURT  
EMORY ANTHONY  
Counsel for Eric Robert Rudolph

BY:   
MICHAEL BURT

Dated: April 8, 2004

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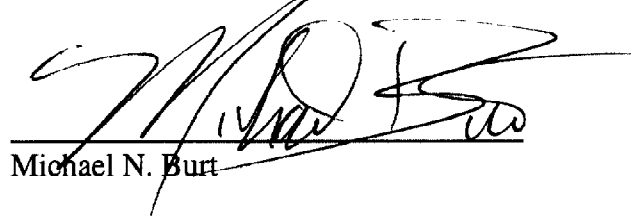
## **CERTIFICATE OF SERVICE**

I do hereby certify that I have served upon the attorney for the government the defendant's Motion to Strike the Death Penalty and accompanying Exhibit A by hand delivery of one copy of the same delivered to:

Michael W. Whisonant  
Robert J. McLean  
Will Chambers

Assistants United States Attorney  
U. S. Department of Justice  
Office of United States Attorney  
Northern District of Alabama  
1801 Fourth Avenue North  
Birmingham, Alabama 35203-2101

This the 8th day of April, 2004.



Michael N. Burt

# EXHIBIT

## A

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WASHINGTON, D.C. BARS  
\*\* ALSO MEMBER OF COLORADO BAR

January 9, 2004  
HAND DELIVERY

GEORGIA OFFICE:  
1401 PEACHTREE STREET  
SUITE M-100  
ATLANTA, GEORGIA 30309  
(404) 881-8866

AUSA Will Chambers  
United States Attorney's Office  
1801 4<sup>th</sup> Avenue North  
Birmingham, AL 35203

**COPY**

RE: Eric Robert Rudolph

Dear Will:

Pursuant to our conversation this afternoon, I have listed below the information we would like to receive regarding all testing done by both the FBI and ATF labs, and any other scientific testing done in connection with this case. Give me a call after you've had a chance to review this list and we can discuss those items on the list that you would prefer not to disclose. I'm glad you had a happy holiday, and look forward to speaking with you.

General requests:

1) Any photos, including those used to confirm or document results, of items and test runs which are used to confirm results - in this case, that may include print-outs of the chemical analysis charts/runs

2) Bench notes - so called because they sit with the examiner at the lab bench and are a running log of everything that the person does and everything observed (including time marks for when a test begins and ends, temperature logs for testing, notes of what process used, how the blanks and control results turned out, etc) - these are handwritten, should show the order in which things are tested. Also, we need to the bench notes for all testing, not just the test runs where they wrote a report. Including but not limited to:

- a) Procedure of chemical preparation of evidence items to be analyzed, such as extraction procedure, solvents used.
- b) Gas chromatograms, liquid chromatograms and mass spectra should also include background runs (carried out before analysis of evidence items for calibration/quality control and assurance).

3) Chain of custody logs

4) Lab protocols

5) Equipment calibration data, equipment specifications and manuals for all equipment used. Including but not limited to:

- a) Parameters and conditions of analytical instruments used:
  - In gas chromatography (GC): type of column, temperature program, carrier gas, type of detector.
  - In liquid chromatography (HPLC): type of column, mobile phase, flow rate, type of detector.
  - In gas chromatography/mass spectrometry (GC/MS): type of ionization (electron ionization (EI) or chemical ionization (CI)).
  - In liquid chromatography/mass spectrometry (LC/MS): type of ionization (electrospray ionization (ESI) or atmospheric pressure chemical ionization (APCI), ion source temperatures and voltages).

AUSA Will Chambers  
Page Three  
January 9, 2004

- 6) Training and experience of technicians who participated in the testing.
- 7) ASCLD accreditation information: the proficiency data, testing results and assessment
- 8) Any correspondence or phone records of calls between examiners, between examiners and lawyers, between examiners and crime scene people
- 9) Any in-house testing or studies that relate to testing done in the labs
- 10) Details and results of monitoring the laboratory for explosives traces and results. Similarly, results from monitoring any personnel or sites that may have any connection with relevant exhibits.
- 11) Laboratory layout, with reference to what is done where and by whom.
- 12) Specifically identify who did what.
- 13) Details of storing and routing of exhibits through the laboratory.
- 14) Details of any other explosives cases conducted by the laboratory around the time of and before the Rudolph case.

Very truly yours,

A handwritten signature in black ink, appearing to read 'H. Hube Dodd, II', written in a cursive style.

H. Hube Dodd, II

HHDII/mg

# EXHIBIT B



U.S. Department of Justice

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January 15, 2004

Mr. H. Hube Dodd, II  
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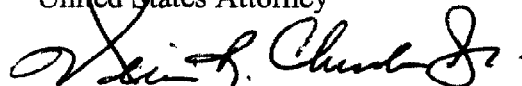
RE: United States v. Eric Robert Rudolph CR 00-S-422-S  
Discovery

Dear Mr. Dodd,

We have reviewed your letter of January 9, 2004, requesting additional disclosure of detailed information relating to laboratory testing and analysis in the above-styled and numbered case by both the FBI and BATF laboratories. We feel it appropriate for you to request disclosure of these items through the filing of a motion for disclosure under Federal Rule of Criminal Procedure 16(a)(1)(G). When such a motion is filed, the United States will be in a position to respond to your requests and provide you with that information discoverable pursuant to Rule 16 and prevailing law. If you have any questions, please do not hesitate to contact me.

Sincerely,

ALICE H. MARTIN  
United States Attorney

  
WILLIAM R. CHAMBERS, JR.  
Assistant United States Attorney